No. 6116

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RALPH WIEN, *Appellant,* vs. ALASKAN AIRWAYS INC. (a corporation), *Appellee.*	

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This is an appeal from an order of the District Court for the Territory of Alaska, Fourth Division, granting the plaintiff (appellee) a temporary injunction against the defendant (appellant).

The motion for injunction was based upon the verified complaint of the plaintiff (Tr. pp. 1-14), and the affidavit of Charles L. Thompson. (Tr. pp. 25-28.) The defendant (appellant) presented in opposition to the motion his affidavit entitled "Resistance to Motion to Show Cause." (Tr. pp. 28-32.) No other evidence was offered by either party, except that at the hearing of the motion it was stipulated that the portion of appellant's affidavit setting forth that the contract upon which the action was based was entered

into by the plaintiff (appellee) for the purpose and with the effect of creating a monopoly, should be deemed denied by the plaintiff "to the same effect as if such denial of such portion had been made in writing by proper affidavit." (Tr. p. 25.)

The complaint alleges that the plaintiff, Alaskan Airways, Inc. was a corporation organized and existing under the laws of the State of Delaware, for the purpose of engaging in the business of transportation in intrastate and interstate and foreign commerce, by aircraft, of passengers and freight of every nature and description; that plaintiff is engaged in such business in Alaska with an office at Fairbanks; that it has paid its annual license fee to the Territory of Alaska and has complied with all of the laws, rules and regulations of the Territory of Alaska pertaining to foreign corporations. It alleges further that prior to August 6, 1929, the defendant Wien was a stockholder and an active member of Wien Alaska Airways, Inc., an Alaska corporation engaged in the transportation of passengers and freight by aircraft in the Territory of Alaska; that said Wien was employed by Wien Alaska Airways, Inc. as mechanic and also took an active part in the general management of said company. It appears further from the complaint that on August 6, 1929, the plaintiff, Alaskan Airways, Inc., purchased all the property, assets and business of Wien Alaska Airways, Inc. and all of the right, title and interest of the said Ralph Wien therein, together with the good will of the business of said corporation, except cash on hand and accounts receivable, for a consideration

of $65,000.00. The property so purchased other than good will was of a value of $40,000.00 and the balance of said purchase price (i. e. $25,000.00) was paid in consideration of the good will of said company and of the individual stockholders thereof, including the defendant Ralph Wien, and of the promises and agreements of said stockholders, including Wien, made with the plaintiff, that the said parties, including Wien, would not for three years from August 6, 1929, enter into competition with the plaintiff and would not enter into any business or have any interest in any other company or partnership that would in any way compete with the plaintiff in such business, and the said parties, including Wien, further agreed as part of the consideration for such purchase price that he would not during such period of three years accept any employment with any airplane company, corporation, or association, or individual, engaged in any business that would in any way compete with the business of plaintiff. The agreement, including the covenants referred to, was in writing and a copy thereof, marked "Exhibit A," is attached to the complaint. (Tr. pp. 7-11.) The complaint alleges that notwithstanding these promises, agreements and covenants the said defendant Ralph Wien, on or about January 10, 1930, entered into the employ of and associated himself with a firm doing business at Fairbanks, Alaska, and carrying on a general transportation of passengers and freight between points in Alaska, and that ever since said 10th day of January, 1930, the said Ralph Wien has been engaged as aviator and pilot of an airplane for said firm and in

violation of his promises and agreements continues to carry on the business of commercial flying in active competition with the business of the plaintiff. On or about January 20, 1930, the plaintiff notified Wien in writing of his violation of the agreement and demanded that he cease such violation and competition, but said defendant, notwithstanding, continues to act as aviator and flyer for said firm and to violate the promises, covenants and provisions of said agreement. There are the usual allegations of irreparable damage if the defendant be not restrained and an averment that he is not financially able to respond to a judgment for damages.

The affidavit of Charles L. Thompson (Tr. pp. 25-28) supports the material allegations of the complaint, including the averment that the defendant Wien is not financially able to respond in damages.

The affidavit of Ralph Wien does not deny any of the allegations of the plaintiff's complaint or of the affidavit of Thompson, except the allegation that defendant is not financially able to respond to a judgment for damages. There is, therefore, no dispute regarding the corporate capacity of the plaintiff; the existence and status on August 6, 1929 of Wien Alaska Airways, Inc.; the relation of the defendant Wien to the last named corporation; the purchase by plaintiff on August 6, 1929 of all the property, assets and business of Wien Alaska Airways and all of the right, title and interest of the defendant Wien therein; of the payment for such property, business and assets of Wien Alaska Airways, Inc. and of Wien

of the purchase price of $65,000.00; that $25,000.00 of this sum was paid for the good will of the company and of its stockholders, including Wien, and of their covenants and agreements not to enter into competition with the plaintiff for a period of three years; that notwithstanding these agreements the defendant Wien, after receiving such consideration, entered into business with associates in competition with the plaintiff and in defiance and in violation of his covenant not to do so. It may also be pointed out that Wien's affidavit in resistence to the application for temporary injunction alleges that when the contract of sale was made on August 6, 1929, all of the stock of Wien Alaska Airways, Inc. was owned and held by the appellant and the two other persons who had signed the agreement as individuals, and that Wien, with the two other prior owners of such stock, immediately thereafter dissolved said Wien Alaska Airways, Inc. (Tr. pp. 31-32.)

There was, therefore, no attempt on the part of the defendant to question any of the allegations of fact (other than his own want of financial responsibility) upon which the plaintiff asserted its right to an injunction to restrain the further violation of the agreement admitted to have been made with it. The affidavit of Wien attempts merely to set up affirmative matter designed to show that the plaintiff was precluded from resorting to the court for the relief to which it was otherwise clearly entitled for two alleged reasons:

(a) That it had failed, prior to the making of the contract of August 6, 1929, to file the statements and

other papers and to pay the taxes and fees required under the Alaskan code of foreign corporations doing business in Alaska; and

(b) That its purchase of the assets and business of Wien Alaska Airways, Inc., and of its stockholders was made under a plan and purpose of creating in itself a monopoly of the business of transportation by air within the second, third and fourth divisions of the Territory of Alaska.

With reference to point (a), the averments of Wien's affidavit are in effect that plaintiff filed a copy of its charter or articles of incorporation, its designation of an agent for service of process in Alaska and its financial statement in the office of the Clerk of the District Court for the Fourth Division on September 12, 1929, and not before; that it filed a copy of such papers in the office of the auditor of the Territory of Alaska on the 22nd day of October, 1929, and not before; and that it paid the corporation tax and other fees required by law of foreign corporations doing business within Alaska on the 22nd day of October, 1929, and not before; that on August 1, 1929, the plaintiff purchased all the property, good will and business of Bennett-Rodebaugh Airplane Company, a corporation doing business as a common carrier through the air in the transportation of passengers and freight in the Territory of Alaska and between the first day of August and the 6th day of August, 1929 (the latter being the date of the purchase from Wien Alaska Airways Inc., and its stockholders) the plaintiff was engaged as a common carrier in doing an airplane business transporting passengers and

freight by air between points in the Territory of Alaska, and plaintiff continued at all times after the first day of August, 1928, to do business in the Territory and held itself out to the public as being a common carrier in that business.

With respect to point (b), the statements contained in the affidavit are that when plaintiff made his contract with Wien Alaska Airways, Inc., and its stockholders, it had already purchased the property and business of Bennett-Rodebaugh Airplane Company and had already arranged to purchase the property and business of another corporation engaged in a similar line of business; that the only transportation by air within the Second, Third and Fourth Divisions of Alaska on the 5th day of August, 1929, was that furnished by the three companies referred to. The affidavit further states that plaintiff purchased said Bennet-Rodebaugh Airplane Company and entered into the contract set forth in the complaint and purchased the business, goodwill and property of the third company during the month of August, 1929, pursuant to a general plan to purchase all of said companies and to thereby eliminate all competition and create a monopoly in itself.

The only questions raised by appellant on its appeal are these:

1. Was the contract here sought to be enforced absolutely void, and was the appellee disabled to use for its enforcement because the contract was entered into before the appellee had performed the various acts required by the law of Alaska to qualify it to do business in that Territory, although all of these acts

were performed before the action was commenced? and

2. Was the contract sought to be enforced in violation of the Federal statutes forbidding undue and unreasonable restraint of trade? (Ap. Br. p. 4.)

ARGUMENT.

I.

UNDER THE LAW OF ALASKA THE CONTRACT OF AUGUST 6, 1929, WAS NOT VOID, BUT AT MOST VOIDABLE. IT IS ENFORCEABLE AGAINST THE APPELLANT, WHO HAS NOT DISAFFIRMED IT, AND RETAINS THE CONSIDERATION.

The appellant, in the portion of his brief directed to the support of the claim that the contract of August 6, 1929, was absolutely void and enforcible, sets forth some of the provisions of Chapter Twenty-three of the Complied Laws of the Territory of Alaska (1913) entitled "Of Foreign Corporations." The brief dwells particularly upon the last section of this chapter. (Section 660.) There is, however, no reference in the brief to Section 657, which, as we contend, is the section applicable to this case.

Chapter Twenty-three contains seven sections (654-660 inclusive) and it will, we think, aid the court in its consideration if we here set forth or summarize the various sections of the chapter in their order. Some of them have been amended since the publication of the Compiled Laws of 1913, and we shall indicate the nature of the amendments as we proceed:

Section 654 prohibits corporations organized under the laws of the United States or of any state or terri-

tory of the United States other than Alaska, or the laws of any foreign country, from doing or engaging in business within the Territory of Alaska without first having filed in the office of the Secretary of the Territory and the office of the Clerk of the District Court for the division in which it intends to engage in business, an authenticated copy of its charter or articles of incorporation, a verified statement showing its name, the location of its principal place of business without and within the Territory, the amount of its capital stock, the amount thereof paid in in money and the amount paid in otherwise; the amount, value and character of its assets and the amount of its liabilities, together with a certificate consenting to be sued in the court of the Territory and designating an agent resident in the Territory upon whom service may be made.

This section was amended in 1923 (Chapter 69, Session Laws of Alaska, 1923) but the changes from the original form as compiled in 1913 are not material to any question arising on this appeal. The amended section is set forth substantially in full at pages 9 and 10 of appellant's brief.

Section 655 requires the filing of the written consent of the person designated to act as agent for service of process.

Section 656 defines the procedure in case of the death, removal or disqualification of the designated agent or the revocation of his consent.

Section 657 which, we submit, is of primary importance in this inquiry, reads as follows:

> "If any such corporation or company shall attempt or commence to do business in the district without having first filed said statements, certificates and consents required by this Chapter, it shall forfeit the sum of $25.00 for every day it shall so neglect to file the same; *and every contract made by such corporation or any agent or agents thereof during the time it shall so neglect to file such statements, certificates or consents shall be voidable at the election of the other party thereto.* It shall be the duty of the United States attorney for the District to sue for and recover, in the name of the United States, the penalty above provided, and the same, when so recovered, shall be paid into the Treasury of the United States." (Italics ours.)

Section 658 requires every such corporation or company to make an annual report containing the information required in Section 654 and to file the same and a duplicate thereof.

Section 659 allows a period of 90 days after the effective date of the Act for corporations theretofore engaged in business to comply with its provisions.

The chapter ends with Section 660, which we here repeat.

> "If any corporation or company shall fail to comply with any of the provisions of this Chapter, all contracts made by such corporation or company with residents of the Territory of Alaska made in the Territory shall be void as to the corporation or company, and no court of the Territory shall enforce the same in favor of the corporation or company."

Section 660 was also amended in 1923. The change has no bearing on the present question. Prior to 1923 the section read:

> "If any such corporation or company shall fail to comply with any of the provisions of this Chapter, all its contracts with citizens of the District shall be void as to the corporation or company and no court of the District, or of the United States shall enforce the same in favor of the corporation or company so failing."

Statutes prescribing the conditions upon which corporations may do business within a jurisdiction other than that of their organization are practically universal, and there have been innumerable decisions interpreting such statutes and declaring the effect of a failure to comply with the conditions imposed, or of a delay in compliance. It would be of small aid to attempt to review the great mass of authority, since the statutes of the different states vary greatly and the conclusion reached depends largely upon the language of the particular enactment under consideration.

> "The effect of these statutes forbidding corporations from doing business in the state, except on compliance with their terms, depends necessarily on the wording and the construction of such enactments. However, the statutes of some of the states, according to the holdings of the courts thereunder, do not make contracts entered into without complying with their provisions, absolutely void. And the prevailing rule is, in the absence of expressed statutory provisions, that contracts of foreign corporations which have not

complied with the requirements permitting them to do business in the state are valid and enforceable. * * * Very generally the right to enforce the contract is allowed where there has been a compliance with the statutory requirements before commencement of the suit to enforce the contract." (8 *Thomp. Corp.* (3d Ed.), Section 6659.)

On the other hand, there are many cases holding that where the statute expressly or by necessary implication declares that contracts made without compliance with the requirements are void or cannot be enforced, the corporation cannot maintain an action for relief under the contract. (8 *Thomp. Corp.* (3d Ed.) Section 6662.)

Again, "The statutes of some of the states prohibit in express terms or by clear implication a foreign corporation from maintaining any action in the courts of the state until it has complied with the provisions prescribing the conditions on which such a corporation shall do business in the state. These statutes do not affect the validity of contracts made in the state by a foreign corporation which had not complied with the provisions, but suspend the remedy and prevent any action on any such contract until compliance." (8 *Thomp. Corp.* (3d Ed.) Section 6664.)

If Section 660 of the Compiled Laws of Alaska stood alone—if it were the only provision of Chapter Twenty-three relating to failure or delay in compliance with the conditions imposed on foreign corporations doing business in Alaska—it might well be argued that a contract made by such a corporation

with a resident of the Territory was absolutely void and that subsequent compliance would not cure the neglect of the corporation to meet the conditions before entering into the contract. It may be remarked, parenthetically, that authority is not lacking to support the conclusion that even under a statute like Section 660, compliance with the conditions prior to the institution of the action will entitle the corporation to maintain a suit on the contract thus made. It will be noted that Section 660 does not declare that the contract "shall be void," but that it "shall be void *as to the corporation or company*, and no court of the Territory shall enforce the same in favor of the corporation or company." An Oklahoma statute, in substantially identical terms, (i. e. "shall be void as to the corporation and no court of the state shall enforce the same in favor of the corporation") was considered by the Supreme Court of that state in *M. S. Cohn Gravel Co. v. Southern Surety Co.*, 264 Pac. 206. The court said:

> "The words 'void' and "voidable' are frequently used indiscriminately * * *. Had Section 5435 concluded by saying that such contracts 'shall be void' without adding 'as to the corporation' there could have been no doubt that the legislature meant that such contracts would in legal effect be nullities and no right could grow out of them. This latter expression 'as to the corporation,' limits and restricts the meaning of the word 'void' so that it has no application in its correct meaning as to such contracts so far as the rights of citizens of the state which may arise thereunder are concerned. The legislature hav-

> ing specified against whom such contracts should be void, there is no room for the contention that they should be void as to any other party. This presents the exact situation of a voidable contract."

See also *Mutual Benefit Life Ins. Co. v. Winne* (Mont.), 49 Pac. 446, where Honorable Wm. H. Hunt, then a justice of the Supreme Court of Montana, gave elaborate consideration to a similar statute and concluded that the word "void," when coupled with the words "as to such incorporation" was to be interpreted as meaning "voidable" rather than as utterly void and nugatory.

But we are not required in this case to make a contention based on Section 660 as if that section stood by itself. Section 657 is a part of the same chapter, and must under the most elementary rules of statutory interpretation, be considered with the other parts of the chapter. It is not to be supposed that the legislature in enacting these two sections intended that either should be ineffectual or that one should destroy the other. If they can reasonably be read so as to give them harmonious effect, and to make each operative within its proper scope, they should be so interpreted.

We submit that the fair construction of the two sections is that they deal with two different situations. Section 657 applies to the case of a corporation which has complied with the statutory requirements, but has neglected such compliance until after it has commenced to do business in the Territory and

has undertaken to make contracts therein. Section 660 has to do with the case of a corporation which has never performed the conditions imposed by the statute. In the former case the corporation which attempts to do business before compliance is subject to a fine of $25.00 for each day of its neglect to file the required papers, and every contract made by it during the period of such neglect, is made *"voidable at the election of the other party thereto."* This clearly has reference to the case, not of a corporation which never files, but of a corporation which has filed too late. Its neglect or delay is punished by a fine and by the further penalty of having its contracts subject to avoidance at the election of the other party, but not by having such contracts made absolutely void and of no effect. Section 660, however, has to do with a corporation which shall "fail to comply with any of the provisions of this Chapter." Contracts made by such a corporation, i. e., by one which has completely ignored and set at defiance the laws of the Territory is made void as to the corporation and the courts of the Territory are forbidden to enforce the same in its favor.

The interpretation for which we contend has the support of the only decision of the Alaskan courts in which the question was directly presented and adjudicated. That case (*Ames v. Kruzner,* 1 Alaska 598) is not referred to in appellant's brief. It is direct authority in favor of the appellee and has stood unquestioned since 1902, the year of its rendition. As we shall show, no one of the other Alaskan cases cited by appellant is in point. In none of them was Sec-

tion 657 under consideration and the observations regarding Section 660 were in each instance unnecessary to the decision, and dicta.

In *Ames v. Kruzner,* a foreign corporation brought suit to foreclose a mortgage. The defense was based on the fact that the corporation had not qualified under the laws of Alaska until four days after the making of the note and the delivery of the mortgage. The court, after setting forth the two sections now in question (as they then read) said:

> "The defendants received the consideration for the note and the defense has no merit except the technical wording of the statute upon which they pleaded * * *. A graduated series of penalties is imposed in case of their failure to comply with the law in these respects * * *. The real distinction between these two sections is seen in comparing the penal clause against the enforcement of contracts (Here Section 657 under the earlier number of 228 is set forth). I understand this section to mean that a contract made by any person on October 15th with a foreign corporation which did not file its statements, certificates and consent until October 20th, and which came to suit subsequent to that date, is voidable at the election of the other party thereto. It is not void but only voidable * * *. Section 231 (now numbered 660), however, has but one object, viz.: it is a withdrawal of all jurisdiction in the the court to enforce in favor of the corporation a contract falling within its terms. I understand it to mean that a contract made by any person, say on October 16, 1900, with a foreign corporation which wholly failed thereafter to comply with the law, cannot be enforced by the court

> in favor of the corporation for want of jurisdiction of the court. The contract strictly speaking is not void but only voidable when considered from the standpoint of the other party * * *.
>
> "It follows * * * that in the case at bar the contract note sued upon is, as against the corporation, only voidable under Section 228 and not void under Section 231. The court has jurisdiction to enforce the contract unless it is voided in its judgment."

This view not only gives effect and meaning to both sections, but it is in accord with the general policy of the law against forfeitures. As this court said in *Ross-Higgins Co. v. Protzman,* 278 Fed. 699, 702, "the section (660) should be construed with reasonable strictness," meaning, as the context shows, that it should be construed so as to prevent the forfeiture of the right claimed by the corporation. Here the appellant insists upon the broadest and most sweeping construction of Section 660, and a construction which would make the section destructive of the provisions of Section 657 in every case where a resident of Alaska entered into a contract with a foreign corporation.

As we have said, none of the three Alaskan cases cited by appellant at pages 13 to 15 of its brief decides or attempts to decide that a contract by a corporation which has performed the statutory conditions after the making of the contract, but before suit, is void.

In *Burr v. House,* 3 Alaska 641, the defendant, a foreign corporation, asserted a mechanic's lien for

materials used in the building of a house on the land claimed by plaintiff. The plaintiff sought to defeat the corporation's claim by pleading on information and belief its failure to comply with the statutes governing the qualification of foreign corporations. The court held that the failure to qualify, being a matter of public record, could not be pleaded on information and belief. The attempt to defeat the corporation's contention having failed on this ground, the court went on to make the remarks quoted at the bottom of page 13 of appellant's brief. The court had no occasion to define the precise provisions of the two Sections, 657 and 660, and the general language quoted would not support the appellant's present position, even if it had been necessary to the decision.

In re Craig Lumber Co., 6 Alaska 656, was a case in which two foreign corporations claimed as creditors in a bankruptcy proceeding. One of them attacked the ruling of the referee that the other had an enforceable claim. It was sought to attack this holding on the ground that the prevailing creditor had not qualified under the statute and that its contract was therefore void under Section 660. The ruling was that Section 660 had no application, since it dealt only with contracts made with citizens of Alaska and the objecting corporation was not such a citizen. This was the sole basis of the decision and it was sufficient to dispose of the controversy. The question of the status of a foreign corporation which had fulfilled the requirements of the statutes after entering into a contract was not before the court and was not considered.

In *Alaska Siberian Navigation Co. v. Polet,* 7 Alaska, 354, the plaintiff, a foreign corporation, had brought an action upon a guaranty. A general demurrer was sustained on grounds based on the statute of frauds. The court went on with some expressions, obiter, calling the attention of the plaintiff to the fact that if it should plead over, attention should be given to the necessity or propriety of pleading compliance with the statutes requiring filing of papers by foreign corporations. The language of the court is not that quoted on page 14 of appellant's brief, which appears to be taken from the syllabus rather than from the opinion. At any rate the court did not attempt to construe Sections 657 and 660. It merely quoted Section 660 and expressed the view (which is in itself questionable), that a foreign corporation suing on a contract must allege affirmatively its compliance with the statutory conditions.

The two cases in this court, cited by appellant at page 15, do not support his contention. On the contrary they are rather in favor of the appellee. *Cobb v. McDonald-Weist Logging Co.,* 278 Fed. 165, was similar to *In re Craig Lumber Co.,* supra. It was a controversy between two corporations claiming as creditors of a bankrupt. Both were Washington corporations. The court held that since neither was a citizen of Alaska, Section 660 had no application. It does not appear that the corporation whose claim was attacked had ever made the necessary filings. Similarly in *Ross-Higgins Co. v. Protzman,* 278 Fed. 699, Section 660 was held to be inapplicable because it did not appear that the contract attacked was made

with a citizen of the District. In this case it appeared that the corporation in question had never complied with the provisions of the Alaskan law relating to foreign corporations.

If the contract is merely "voidable at the election of the other party thereto," as declared in Section 657, it is perfectly clear that the appellant has not exercised his election to avoid or disaffirm the contract, but on the contrary has affirmed it and retained the benefits which he received under it.

The agreement was made the 6th day of August, 1929, and the purchase price of $65,000.00 was paid at that time. (Tr. pp. 2-3.) $25,000.00 of this amount was paid in consideration of the good will of the Wien Alaska Airways, Inc., and of its stockholders, and of the covenants of such stockholders not to enter into competition with the plaintiff for a period of three years. (Tr. p. 3.) Plaintiff had then performed everything which it was required to perform under the agreement. All of the stock of the selling corporation was owned by the appellant and two others, and immediately after the execution of the contract the three dissolved Wien Alaska Airways, Inc., (Tr. pp. 31-32) and presumably distributed among themselves the purchase moneys received from the plaintiff. The selling corporation thus passed out of the picture, and the money paid for the physical assets, for the good will of the corporation and its stockholders and for the covenant not to engage in a competing business for a limited time, went into the pockets of the three stockholders who were the real parties in interest. Nothing was done by the appel-

lant to restore any part of the consideration received by him or to question or disaffirm the contract which he had made, until after this action was brought. He retained the money which he had received in payment for his covenant not to compete with the purchaser of his good will, and about five months after making the agreement simply proceeded to violate it. (Rep. Tr. p. 4.) When the plaintiff, at the end of January, 1930, brought this action for equitable relief against such violation, the defendant still made no offer to restore the consideration or disaffirm the contract, but took the position that the agreement was void, and that he could break it, still retaining the money that had been paid him.

The untenability of appellant's position in this respect is, we think, sufficiently demonstrated by quoting the language of this court in *Cobb v. McDonald-Weist Logging Co.*, supra, 278 Fed. at page 167:

> "The provision of Section 657, making every contract entered into by any foreign corporation or company, or by any agent or agents thereof, without having first filed the required statements, certificates, and consents, 'voidable at the election of the other party thereto' is also plainly inapplicable to the present case, for the reason, not only that it does not appear that the bankrupt corporation ever elected to treat the contract it made with the appellee as void, but, on the contrary, it affirmatively appears from the record that it accepted the benefit of the contract to a large extent."

II.

THERE IS NO SHOWING THAT THE CONTRACT IS IN VIOLATION OF THE FEDERAL STATUTES DEALING WITH RESTRAINT OF TRADE.

That the contract, considered by itself, was a perfectly legitimate and valid one, does not appear to be seriously disputed by the appellant. The transaction between the parties was simply one by which the plaintiff (appellee) acquired the business and assets of Wien Alaska Airways, Inc., and the good will of said corporation and its stockholders, with the accompanying covenants of the selling company and its stockholders not to compete with the plaintiff in the Territory of Alaska for a period of three years.

> "It is well settled that the sale of a business, and the surrender of the good will pertaining to that business, and an agreement thereunder, within reasonable limitations as to time and territory, not to enter into competition with the purchaser, when made as part of the sale of the business, and not as a device to control commerce, is not within the Federal anti-trust law. United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 329, 17 Sup. Ct. 540, 41 L. Ed. 1007; United States v. Joint Traffic Ass'n, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259; Bement v. National Harrow Co., 186 U. S. 70, 92, 22 Sup. Ct. 747, 46 L. Ed. 1058; Cincinnati Packet Co. v. Bay, 200 U. S. 179, 185, 26 Sup. Ct. 208, 50 L. Ed. 428; Fisheries Co. v. Lennen (C. C.), 116 Fed. 217; Davis v. A. Booth & Co. (6th Circuit), 131 Fed. 31, 65 C. C. A. 269."

Darius Cole Transportation Co. v. White Star Line, 186 Fed. 63, 65.

See, also,

Camors-McConnell Co. v. McConnell, 140 Fed. 412;

Lumbermen's Trust Co. v. Title Ins. & Inv. Co., 248 Fed. 212.

It cannot be claimed that the restrictions imposed upon the appellant and his associates by their agreement were in any way unreasonable, or more extensive than was necessary to protect the purchaser in the enjoyment of the good will of the business which it had bought—a good will for which it paid $25,000.00. The territory to which the restriction applied was limited to that within which the business of appellee was to be carried on, i. e. the Territory of Alaska. The duration of the restriction was limited to a term of three years. There is therefore no basis for a contention that the restraint on the sellers was "greater than necessary to afford fair protection to the legitimate interests of the purchaser," as was the case in *United States v. Great Lakes Towing Co.,* 208 Fed. 733, 742.

The appellant attempted, by his affidavit entitled "Resistance to Motion to Show Cause" (Tr. p. 28), to show that the contract of purchase here in question was part of a scheme or plan of appellee to acquire a monopoly of the business of airplane transportation in Alaska. There are two simple answers to the appellant's contentions in this regard.

(a) It was stipulated at the hearing (Tr. p. 25) that the portion of appellant's affidavit setting forth that the contract was entered into by the plaintiff for

the purpose and with the effect of creating a monopoly of the airplane business in Alaska should be deemed denied by plaintiff to the same effect as if such denial had been made by proper affidavit. There was therefore a direct issue of fact on this point, and the action of the trial court in accepting the appellee's evidence rather than that of appellant was a proper exercise of its judicial discretion.

(b) The specific facts set up in appellant's affidavit do not on their face show that the contemplated acquisition by appellee of the business of three airplane companies had any tendency to limit competition or to restrain trade. The affidavit sets forth that on August 1, 1929, the plaintiff purchased the property, good will and business of Bennett-Rodebaugh Airplane Co., doing a business as common carrier in air transportation in Alaska; that on August 6th it purchased the business of Wien Alaska Airways, Inc.; that on the last named date it had arranged to purchase the business of Anchorage Air Transportation Corporation, doing a like business in Alaska, and that on August 5, 1929, these three corporations were the only ones engaged in air transportation business in Alaska. For all that the affidavit shows, the three companies may have been operating over entirely separate routes and may not have been competing in any way. As Mr. Justice Holmes said in *Cincinnati Packet Co. v. Bay*, 200 U. S. 179, 50 L. Ed. 428:

> "A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts."

In its argument on the supposed violation of the Federal Statutes regarding restraints of trade the appellant (Br. p. 31) cites the provision of the Clayton Act prohibiting a corporation engaged in commerce from acquiring the stock of another corporation engaged in commerce where the effect is to lessen competition between the two. (*U. S. Code,* Title 15, p. 220.) As we have just pointed out, the appellant has made no showing that competition would be lessened. But, regardless of this consideration, the section deals with the purchase of the stock of one corporation by another corporation. There was no purchase by appellee of any part of the stock of Wien Alaska Airways, Inc. It purchased the assets and business of the corporation itself. The section cited obviously has no application whatever.

Finally, with respect to appellant's attack based upon the Sherman Act and the Clayton Act, we quote as particularly applicable, the language of this court in *Lumbermen's Trust Co. v. Title Ins. & Inv. Co.,* supra, at page 220:

> "The attack upon the legality of these contracts comes, not from the public, or from any one who claims to have been injured thereby, but from parties who deliberately entered into them. Before such contracting parties can be absolved from their solemn obligations, it must be shown that their agreements are clearly and manifestly injurious to the interest of the public. 'It has been clearly recognized in recent times that public policy is at least as much concerned in holding persons to their contracts as in prohibiting contracts in restraint of trade.' Joyce on

Monopolies, sec. 94. In Printing and N. R. Co. v. Sampson, L. R. 19 Eq., 462, 465, it was said:

"'It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice.'"

III.

THE ACTION OF THE TRIAL COURT IN GRANTING A TEMPORARY INJUNCTION SHOULD BE AFFIRMED ON APPEAL, EVEN THOUGH THERE BE DOUBT AS TO THE LAW OR THE FACTS, UNLESS THERE HAS BEEN A MANIFEST ABUSE OF DISCRETION.

"It would be superfluous to cite authorities to show that the granting or refusing of a preliminary injunction is a matter resting largely in the discretion of the trial court. Where there is a substantial conflict in the evidence regarding an issue which may affect the discretion of the court in passing upon the application for such injunction the order made will not on appeal be overthrown merely because there may be considerable or even preponderating evidence, which, if believed, would have led to a contrary conclusion. The granting or denial of a preliminary injunction does not amount to an adjudication of the ultimate rights in controversy. It merely determines that the court, balancing the respec-

tive equities of the parties, concludes that, pending a trial on the merits, the defendant should or that he should not be restrained from exercising the rights claimed by him. When the cause is finally tried, it may be found that the facts require a decision against the party prevailing on the preliminary application."

Miller & Lux v. Madera C. & I. Co., 155 Cal. 59, 62-3.

The rule declared in the California case just cited has been frequently applied in the Federal courts, it being held that the action of the trial court should be sustained, not merely where there is doubt as to the facts, but, as well, where there may be uncertainty regarding questions of law.

In *Massie v. Buck,* 128 Fed. 27, 31, the Circuit Court of Appeals for the Fifth Circuit said:

"To what extent ought this court go into an examination of the merits of a case on an appeal from an interlocutory order granting a temporary injunction? Unless there is some strong reason for it, we ought not to decide the merits of the case before they have been decided by the lower court. The granting or withholding of a preliminary injunction is in the sound judicial discretion of the Circuit Court. We ought not to interfere with the exercise of that discretion, unless it clearly appears that the court has erred under the established legal principles which should have guided it. Clearly, the propriety of its action should be considered from the standpoint of the Circuit Court. When a bill is presented asserting claims that raise grave questions of law, and which the court must decide before

rendering a final decree, it is within the sound judicial discretion of the court to preserve the existing status until the case is finally decided, whenever that course is necessary to fully protect the plaintiff."

To the same effect are:

Lehman v. Graham, 135 Fed. 39;

McConnell v. Camors-McConnell Co., 140 Fed. 987.

In the case at bar the court below granted the plaintiff a temporary injunction restraining the defendant (appellant) from violating a contract admittedly made by him on a valuable consideration which he had received and retained. It appeared that the plaintiff was without an adequate remedy at law and that equitable relief was necessary for its protection. The order granting the temporary injunction merely preserved the existing status until there could be a trial and a hearing on the merits. The defendant (appellant) is protected by an injunction bond. (Tr. pp. 21-23.) The defendant in the court below (appellant) raised no issue regarding any of the allegations of plaintiff's bill. The equities are not denied. The appellant merely relied upon claims, which at best are doubtful, that the plaintiff was incapacitated to maintain the action because of its alleged delinquencies in matters not connected with the contract sued upon. We submit that even if this court should feel that there is some question regarding the ultimate merits of the case, it should not at this time go into an examination of the doubtful

questions presented but should leave them for decision by the lower court.

CONCLUSION.

Appellee respectfully submits that the order granting a temporary injunction should be affirmed for the reasons hereinabove set forth, i. e.:

(1) The plaintiff's delay in qualifying under the Alaskan law did not render the contract void; on the contrary the contract was merely voidable and subject to disaffirmance by the appellant, who did not disaffirm it.

(2) The record does not support the claim that the contract violates any Federal statute governing agreements in restraint of trade.

(3) The order granting a temporary injunction gives the appellee protection which it is entitled to retain until a hearing on the merits can be had and any questions of law and fact can be fully and fairly presented to the lower court and determined by it.

Dated, San Francisco,
June 14, 1930.

Respectfully submitted,

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